THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Special Circuit Judge

2014-002246

Lewallen Automation, LLC, and ASAG Energy, LLC, ... Respondents,

v.

Michael Lewallen and Everworks, LLC, ... Defendants,

Of whom Michael Lewallen is the ..... Appellant.

FINAL BRIEF OF RESPONDENTS

HAYNSWORTH SINKLER BOYD, P.A.

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STATEMENT OF ISSUES ON APPEAL

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II. IF THE ISSUES IN THIS APPEAL ARE NOT DETERMINED TO BE MOOT, WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ISSUING THE TEMPORARY INJUNCTION.

III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN SETTING THE BOND IN THIS MATTER IN THE AMOUNT OF $2,500.

STATEMENT OF THE CASE

Lewallen Automation, LLC ("LALLC") filed its Complaint in this action on September 4, 2014. LALLC alleges causes of action for specific performance, breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty / duty of loyalty, misappropriation of trade secrets,[1] tortious interference with customer contracts and relationships, tortious interference with employment contracts, tortious interference with prospective contractual relationships, fraud/misrepresentation, unjust enrichment, defamation, and violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, civil conspiracy, and constructive trust. By way of its Complaint, LALLC seeks not only monetary damages, but a permanent injunction, compelling Lewallen to abide by two agreements he entered into, enjoining and restraining Defendants from continuing to misappropriate for his own business use LALLC's trade secrets and other confidential information, and enjoining and restraining Defendants from interfering with LALLC's contracts.

FACTS

LALLC is a turn-key provider of industrial automation, custom electrical/pneumatic panels and high quality control systems. (R. p. 185 ¶3). Among other services it provides, LALLC builds OEM electrical panels for several customers utilizing lean manufacturing practices. (Id.). LALLC is also a UL Certified 508A Panel Shop and provides contract project management, engineering and technical support for its

[1] The South Carolina Trade Secrets Act provides aggrieved parties with the right to seek an injunction enjoining a party from further misappropriating and using protected trade secret information. S.C. Code §39-8-30 (2006). Plaintiff is seeking a permanent injunction against Defendants as a remedy for their misappropriation of Plaintiff's trade secrets and other confidential information.

customers. (Id.). LALLC has developed a body of information associated with the assembly and servicing of its panels. (R. p. 185 ¶4). The information it has developed includes customer purchasing history, pricing, individual customer specifications and requirements, pricing formulas, profit margins, customer contact information, usage history, vendor costs, supplier information, and other confidential information concerning Plaintiff's customers, vendors, and the panels. (Id.).

From approximately March 28, 2008 to December 31, 2012, Defendant Michael Lewallen ("Lewallen") was a member of LALLC, holding a forty percent (40%) equity interest, and was an officer and president of LALLC. (R. p. 186 ¶5). On December 31, 2012, Lewallen sold all of his equity interest in LALLC pursuant to a Membership Interest Purchase Agreement. (R. p. 186 ¶¶5-6). Among other things, the Membership Interest Purchase Agreement, to which Lewallen is a party, provides:

> The Parties shall hold in confidence at all times following the date hereof all Confidential Information and shall not disclose, publish or make use of Confidential Information at any time following the date hereof without the prior written consent. Any remedy at law for any breach of the provisions contained in this Section shall be inadequate and the non-breaching party shall be entitled to injunctive relief in addition to any other remedy available hereunder or under applicable Law.

(R. p. 186 ¶6; R. p. 205). The term "Confidential Information" is defined in the Membership Interest Purchase Agreement as "any data or information of the Companies or Purchaser that is valuable to the operation of the Companies and not generally known to the public or competitors." (R. p. 186 ¶6; R. p. 205). The term "Companies" is defined in the Membership Interest Purchase Agreement to include LALLC. (R. p. 186 ¶7; R. p. 191).

On December 31, 2012, the same date as the Membership Interest Purchase Agreement, Lewallen resigned his position as president of LALLC and entered into an "Employment Agreement" with LALLC, pursuant to which he became vice president of LALLC. (R. p. 186 ¶8). Lewallen remained employed as vice president of LALLC until his termination on June 30, 2014. (R. p. 187 ¶9). In the Employment Agreement, Lewallen is referred to as "Employee" and "Companies" is defined to include LALLC. (R. pp. 186-87 ¶8). The Employment Agreement provides that:

> The Companies hereby employs Employee as vice president of each Company. As such, Employee shall have responsibilities, duties and authority reasonably accorded to and expected of a vice president. Employee hereby accepts this employment upon the terms and conditions herein contained and, subject to paragraph 1(b), agrees to devote his working time, attention and efforts to promote and further the business of the Companies.

The Employment Agreement further provides that:

> Employee is employed hereunder by the Companies in a confidential relationship wherein Employee, in the course of his employment with the Companies, has and will continue to become familiar with and aware of information as to the customers of the Companies and the Companies' specific manner of doing business, including the processes and techniques, and future plans with respect thereto, all of which has been and will be established and maintained at great expense to the Companies.

Paragraph 6 of the Employment Agreement provides:

> Trade Secrets. Employee agrees that he will not, during or after the term of this Agreement with the Companies, disclose the specific terms of the Companies' relationships or agreements with its significant vendors or customers or any other significant and material trade secret of the Companies, whether in existence or proposed, to any person, firm, partnership, corporation or business for any reason or purpose whatsoever.

(Id.; R. p. 214; R. p. 216).

As vice president of LALLC, Lewallen was privy to confidential and trade secret information belonging to LALLC, including, but not limited to, customer purchasing

histories, pricing, individual customer specifications and requirements, pricing formulas, profit margins, customer contact information, usage history, vendor costs, supplier information, production techniques, product formulas and technologies, production limitations, budgets, production schedules, cost information, raw materials, and production processes. (R. p. 187 ¶9). The Trade Secrets derive independent economic value by being unknown and not readily ascertainable by others who could obtain economic value from their disclosure or use. (R. pp. 187-88 ¶9). The Trade Secrets are, and at all times relevant hereto, have been, the subject of efforts that are reasonable under the circumstances to protect the Trade Secrets. (R. p. 188 ¶9). Among other things, LALLC entered into confidentiality agreements with employees and independent contractors that protected this information from disclosure, and entered into non-solicitation and non-competition agreements designed to prevent the use or disclosure of this information. (Id.) It also has in place a badge lock system at its facility, and access to information is restricted by levels of access. (Id.).

While employed as vice president of LALLC, Lewallen failed to carry out his responsibilities and duties as vice president, and failed to devote his working time, attention, and efforts to promote and further the business of LALLC. (R. p. 188 ¶10). In fact, Lewallen rarely showed up for work, and, instead, pursued his own personal interests during the time periods that he should have been working on behalf of LALLC. (Id.).

During the last month of Lewallen's employment, LALLC learned that he was meeting with a representative from a competitor, namely Brian Wright of Tennessee Electric Construction and Maintenance. (R. p. 188 ¶11). LALLC also learned that

Lewallen used company resources for his own personal benefit. (Id.). Lewallen represented to the company that he was working and meeting with possible clients, but was actually not meeting with clients. (Id.). LALLC learned that Lewallen used his company credit card and requested reimbursement for expenses that he claimed were incurred in furtherance of legitimate business endeavors for the benefit of the company but which were actually incurred in furtherance of Lewallen's own personal endeavors rather than a business purpose. (R. pp. 188-89 ¶11). An audit has revealed that Lewallen falsified expense reports to coincide with his company provided credit card statements where he claimed to have entertained clients. (R. p. 237 ¶5).

On or about June 30, 2012, LALLC terminated Lewallen for good cause pursuant to the Employment Agreement. (R. p. 189 ¶12). Following Lewallen's termination from LALLC, LALLC learned that Lewallen went to work for Everworks, which is in the industrial automation business and competes with LALLC. (R. p. 189 ¶13). LALLC has learned that Lewallen has contacted, on behalf of himself and/or Everworks, at least one customer of LALLC, and informed such customer that LALLC would be ceasing its business and, therefore, the customer should do business with Everworks, rather than LALLC. (R. p. 189 ¶14). Specifically, a representative of Michelin, a major LALLC customer, requested a meeting with LALLC on or about August 1, 2014 because he was concerned about LALLC being able to meet Michelin's business needs based on comments made to him by Lewallen. (R. p. 234 ¶3; R. pp. 225-26 ¶¶3-4). Lewallen told Michelin that LALLC's employees were going to follow Lewallen and LALLC would not be able to meet Michelin's needs now that he was not working there. (R. p. 234 ¶4; R. pp. 225-26 ¶4). These statements made by Lewallen are false. (See R. p. 189 ¶14).

In addition, the customer was upset with LALLC for the manner in which it terminated Lewallen, having been told that Lewallen received his termination notice via a text message while he was on vacation with his family. (R. p. 235 ¶6; R. p. 226 ¶6). This representation by Lewallen as to his termination is also false. (R. p. 226 ¶7).

Lewallen has met with employees of LALLC in an effort to persuade them to leave their employment with LALLC and begin working for Everworks in competition with LALLC. (R. p. 189 ¶15). This is particularly damaging to LALLC because Lewallen knows which employees perform which work for customers. (R. p. 250 ¶22). The employees with whom Lewallen has met include employees who have written non-competition, non-solicitation, and non-disclosure agreements with LALLC. (R. p. 249 ¶20). To date, Lewallen has successfully persuaded two (2) employees to date to depart LALLC's employment and go to work for Everworks. (R. pp. 249-50 ¶21). After Lewallen hand-picked one of the employees from LALLC and introduced him to Everworks, LALLC lost work with its customer, Michelin, that the employee performed. The employee is now performing that work to the benefit of Everworks. (R. p. 308 ¶14).

LALLC filed a motion for a temporary injunction on September 5, 2014. A hearing was held September 29, 2014. On October 9, 2014, the Circuit Court entered a temporary injunction that provided, in relevant part:

> 1. Defendant Lewallen shall immediately return and certify in writing to LALLC that he has returned all or its documents, electronic data, and equipment and property. With respect to the January 2014 electronic mail correspondence referenced above, Defendant Lewallen shall not disclose or use it or the information contained therein, and shall protect its confidentiality until such time as the parties resolve how and in what format it shall be delivered.
>
> 2. To the extent that the Plaintiffs determine that a forensic audit is the manner in which they seek return of the information attached

to the January 2014 electronic mail correspondence referenced above, the parties shall convene and agree as to the capture of any electronic data for that purpose. To the extent that Defendant Lewallen provides his personal laptop computer referred to at the hearing to Plaintiffs or their experts for such capture, Plaintiffs shall not retain Defendant Lewallen's laptop computer for longer than seven (7) days.

3. Defendant Lewallen shall not use, directly or indirectly, or disclose any confidential information or trade secrets of LALLC, as defined by the parties in the Membership Interest Purchase Agreement, §1.01 and §5.04, to mean:

> any data or information of the Companies or Purchaser that is valuable to the operation of the Companies and not generally known to the public or competitors.

And in the Employee Agreement, paragraph 6, to mean:

> Trade Secrets. Employee agrees that he will not, during or after the term of this Agreement with the Companies, disclose the specific terms of the Companies' relationships or agreements with its significant vendors or customers or any other significant and material trade secret of the Companies, whether in existence or proposed, to any person, firm, partnership, corporation or business for any reason or purpose whatsoever.

4. Defendant Lewallen shall not make any misrepresentation to LALLC's customers regarding LALLC's ability or capacity to fulfill orders from such customers.

5. Defendant Lewallen shall not make any statement to LALLC's customers, vendors or employees that suggests or implies that any of LALLC's officers falsify financial records, that LALLC is going to cease business operations, or any other statement meant to cause harm to LALLC.

6. LALLC shall post bond with the Clerk of Court in the amount of $2,500.00 prior to this Order becoming effective.

7. I hereby retain jurisdiction to decide all matters properly brought before the Court pursuant to this Order. This Order shall stay in effect for forty-five (45) days from the date the Court executes and

enters it, and the Court shall reconvene the parties prior to its expiration to determine if the Order shall be continued.

(R. pp. 7-8).

ARGUMENT

I. The Issues Raised in this Appeal Are Moot and Are Not Ripe Since the Temporary Injunction Has Expired.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997)). "'[T]he rule that an appellate court limits its review to the issues necessary to a proper disposition of the appeal, and will not consider immaterial or moot questions, applies when reviewing decrees and orders relating to injunctions.'" Id. at 568, 549 S.E.2d at 597 (quoting 42 AM. JUR. 2D Injunctions § 335 (2000)). "Where a temporary injunction has expired, as here, the issue is moot." Floyd v. Horry Cnty. Sch. Dist., 351 S.C. 233, 234 n. 1, 569 S.E.2d 343, 344 n. 1 (2002). Moreover, the court cannot decide by anticipation questions that may arise in the future. Clark v. Wright, 24 S.C. 526, 536 (1886).

Here, the only order on appeal is the temporary injunction, and all of the issues concern whether the Circuit Court erred in issuing the temporary injunction. Thus, all such issues concern the standards for issuing a temporary injunction. However, the temporary injunction expired on November 24, 2014 (46 days after its issuance). It has not been renewed or continued. Consequently, the questions in this appeal are moot.

Lewallen cannot violate the temporary injunction in the future and cannot have violated it any time since November 24, 2014. The only time that Lewallen could have violated the temporary injunction was from October 9, 2014 to November 23, 2014. No contempt proceeding or other enforcement action on the temporary injunction has been

filed. At this point, none is anticipated. The potential future event of contempt proceedings may not occur at all or, if it does occur, may not result in any finding of actual contempt or any punishment by the court. Lewallen's claim of a continued controversy over the now-expired temporary injunction is dependent on the hypothetical situation where LALLC initiates contempt proceedings, the trial judge issues a contempt order, the trial judge finds defendants actually in contempt, and the trial judge imposes some sort of penalty against Lewallen for the contempt. These events are highly speculative and are exactly the type of "contingent" and "hypothetical" issues that are "not ripe for judicial review." See Waters v. South Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) (stating that an issue that is contingent, hypothetical, or abstract is not ripe for judicial review).

Moreover, even if we assume that Lewallen did violate the temporary injunction between October 9, 2014 and November 23, 2014, and that contempt proceedings were imminent, the issues on this appeal would still be moot. "The orders of the Court, even though erroneous, must be respected and obeyed, until vacated or modified by competent authority." Jennings v. Jennings, 104 S.C. 242, 245, 88 S.E. 527, 528 (1916). The purpose of a contempt is to punish for disobedience and maintain the dignity of the Court. "Therefore, **even if the injunction should be reversed or set aside on appeal, the contempt would not fall with it**, unless the judgment was void for want of jurisdiction, either of the subject of the action or of the defendants." Id. Here, jurisdiction is not at issue. The temporary injunction is no longer in effect and there can be no violation of the temporary injunction in the future (or at any point since November 24, 2014). Even delving into the hypothetical situation that Lewallen violated the temporary injunction when it was

in effect, the reversal of the injunction would not impact proceedings on any such violation since Lewallen was obligated to follow the temporary injunction, even if it was erroneous. The consideration of whether the temporary injunction was appropriate is an academic question that has no impact on the rights of the parties. Consequently, the appeal should be dismissed and the Court need not address the remaining issues presented in this appeal.

II. The Circuit Court Properly Enjoined the Use and Disclosure of Trade Secrets and Confidential Information on a Temporary Basis.

Though the Court should not reach any questions relating to whether the temporary injunction was properly issued, LALLC respectfully submits that the temporary injunction was properly issued.

A. Standard of Review.

"The decision to grant or deny temporary injunctive relief is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion." FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002). "Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous." Compton v. S. Carolina Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011).

Rule 65, SCRCP, gives the Court, on motion of a party, the power to issue a temporary injunction. The ultimate goal of a temporary injunction "is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 600-01, 553 S.E.2d 110, 120 (2001). The "quintessential hallmark of an injunction" is "preservation of the property at issue until the matter has been adjudicated." Grosshuesch v. Cramer, 367 S.C. 1, 5, 623 S.E.2d 833, 836 (2005).

In determining whether to grant a preliminary injunction, the Court must consider whether the moving party alleges "facts which appear to be sufficient to constitute a cause of action for injunction; and, second, on the entire showing from both sides it must appear, in view of all the circumstances, that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending the litigation." Columbia Broad. Sys., Inc. v. Custom Recording Co., 258 S.C. 465, 471-72, 189 S.E.2d 305, 308 (1972) (quoting Transcon. Gas Pipeline Corp. v. Porter, 252 S.C. 478, 167 S.E.2d 313 (1969)). The Court should consider three factors in deciding whether to grant a temporary injunction under Rule 65(a), SCRCP: (1) whether Plaintiff would suffer irreparable harm if the injunction is not granted; (2) whether Plaintiff will likely succeed on the merits of the litigation; and (3) whether there is an adequate remedy at law. Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010). When a temporary injunction is requested, the court may consider the merits of the case in order to determine whether the issuance of the injunction is appropriate. Helsel v. N. Myrtle Beach, 307 S.C. 29, 33, 413 S.E.2d 824, 826 (1992). However, "[o]nce a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Id.

B. The Circuit Court Did Not Abuse Its Discretion In Finding that LALLC Was Likely to Succeed on the Merits.

1. The Agreements are enforceable.

Lewallen argues that the contractual provisions are unenforceable. However, "'[a]n employee's express commitment not to disclose his employer's confidential information, whether or not it comprises trade secrets, unlike the covenant not to compete, cannot be challenged as an unreasonable restraint of trade.'" Milliken & Co. v.

Morin, 399 S.C. 23, 31, 731 S.E.2d 288, 292 (2012) (quoting Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies* § 14:6 (4th ed.2009)). Unlike covenants not to compete, non-disclosure agreements "are not in restraint of trade . . . and thus they are not to be strictly construed in favor of the employee." Id. at 32, 713 S.E.2d at 292.

The Milliken case is similar to the facts in the instant matter. In that case, the former employee resigned from his employer and then started a new venture using confidential information of his employer. In holding that the confidentiality clause in the Milliken Agreement was enforceable, the Court stated, "[i]t is widely recognized that an employer may 'restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship.'" Id. at 38, 713 S.E.2d at 295.

Here, the Agreements are clearly enforceable. In the Membership Interest Purchase Agreement, Lewallen agreed to "hold in confidence at all times following the [date the Agreement was signed] all Confidential Information and shall not disclose, publish or make use of Confidential Information at any time following the date hereof without the prior written consent." (R. p. 186 ¶6; R. p. 205). Confidential Information is defined as, "any data or information of the Companies or Purchaser that is valuable to the operation of the company and not generally known to the public of competitors." (R. p. 186 ¶6; R. p. 192). This information includes all information pertaining to constructing the panels, vendor information, customer information, and other information that Lewallen sold to ASAG.

In his Employment Agreement, Lewallen agreed "that he will not, during or after the term of this Agreement, disclose the specific terms of the companies' relationships or agreements with its significant vendors or customers or any other significant or material trade secret of the companies, whether in existence or proposed, to any person, firm, partnership, corporation or business for any reason or purpose whatsoever." (R. pp. 186-87 ¶8; R. p. 216).

These provisions are clearly enforceable and prevent Lewallen from disclosing LALLC's confidential information and trade secrets. In arguing these provisions are unenforceable, Lewallen cites Carolina Chemical Equipment Company, Inc. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996). However, that reliance is misplaced since the covenant at issue in Muckenfuss prevented the defendant from using "any knowledge or information concerning any aspect of the business" regardless of whether the information was even confidential. The only standard was whether it "*could*, if divulged to a direct or indirect competitor, adversely affect the business of the Corporation . . ." Id. at 293, 471 S.E.2d at 723 (emphasis added). Thus, it prohibited the disclosure or use even of general skills and knowledge that are publicly available. Here, in contrast, Lewallen has only been enjoined from using or disclosing trade secrets and information that is "not generally known to the public or competitors."

Moreover, following Muckenfuss, the legislature made clear that non-disclosure agreements were not void for lack of durational or geographic limitations. See S.C. Code Ann. 39-8-30(D) ("[a] contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or

geographical limitation."). Thus, the Circuit Court properly found that the Agreements are enforceable.

2. The Circuit Court did not abuse its discretion in finding a likelihood of success on the merits as to use or disclosure of information.

LALLC presented evidence that as president and vice president of LALLC, Lewallen was privy to LALLC's confidential information and trade secrets. (R. pp. 187-89 ¶9). LALLC protected this information through agreements with employees not to disclose the information, through instructions to its employees regarding confidentiality and trade secrets, and by keeping the information behind lock and key, including a badge access system that restricted access to information according to levels of access. (Id.).

LALLC presented evidence that Lewallen sent an LALLC spreadsheet of customers and other information to his daughter's personal email address on or about January 20, 2014, as well as to the email address of Rachel Kay and/or Rachel Kleinhans, known to be Lewallen's mistress. (R. p. 312; R. p. 247 ¶12) The spreadsheet lists LALLC's customers and prospects and includes specific information regarding LALLC's efforts to secure certain business and the progress of that business, notes regarding information gathered regarding the customers to aid in those efforts, and LALLC's actual and forecasted sales planning budget. (See R. p. 247 ¶12) This information is essentially LALLC's game plan for how it plans to succeed in the coming year. The information contained in these spreadsheets is highly confidential and proprietary and constitutes trade secret information of LALLC, (R. pp. 247-48 ¶¶11-13), because the lists consist of "information, including a formula, pattern, compilation, program, device, method, technique, or process . . . [not] generally known [and not] readily ascertainable by proper

means." S.C. Code Ann. §39-8-20(5)(a); see also Standard Register Co. v. Kerrigan, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961) (stating that "the most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer.").[2]

Lewallen's conduct in sending this spreadsheet was not only in violation of the Employment Agreement and Membership Interest Purchase Agreements, it was also in violation of LALLC's Confidentiality and Trade Secrets Policy, which prohibits Lewallen from forwarding this confidential information to his or others' personal email addresses. (R. p. 248 ¶13). Despite this policy, Lewallen sent the information to personal email accounts to which he had, **and continues to have**, access. Thus, while working for a competitor, Lewallen has had unfettered access to LALLC's most precious trade secret information and has already called on LALLC customers on that list on behalf of a competitor.

Misappropriation includes, among other things, acquisition of a trade secret by improper means. See S.C. Code §39-8-20(2). Improper means includes "breach or inducement of a breach of a duty to maintain secrecy" and "duties imposed by the common law, statute, contract . . ." S.C. Code §39-8-20(1). Lewallen acquired the trade

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[2] See also, e.g., Tom James Co. v. Hudgins, 261 F. Supp. 2d 636 (S.D. Miss. 2003) ("The Court finds that Tom James's customer list, customer requirements, and sales techniques and methods clearly fall within the definition of 'trade secrets'"); Am. Credit. Indem. Co. v. Sacks, 213 Cal.App.3d 622, 262 Cal.Reptr. 92, 97 (1989) (holding a customer list of an underwriter of credit insurance company was a trade secret because it facilitated solicitation of business to an "elite . . . percent of those potential customers which already have evinced a predisposition to purchase credit insurance"); Ed Nowogroski Ins., Inc. v. Rucker, 944 P.2d 1093, 1097 (Wash. 1997) (holding "the common law rule prohibiting the solicitation of former employer's customers with memorized confidential information remains intact under the [Uniform Trade Secrets Act]"); Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc., 147 F.Supp.2d 1057, 1066 (D. Kan. 2001) (holding customer lists and notes were protectable trade secrets).

secrets through improper means by sending the lists to personal email accounts in violation of company policy and his agreements with LALLC. This conduct clearly constitutes misappropriation of a trade secret, as well as breach of Lewallen's Employment Agreement and Membership Interest Purchase Agreement, which require him not to use or disclose confidential information regarding LALLC and not to disclose the terms of the LALLC's "relationships or agreements with its significant vendors or customers . . ."

Consequently, LALLC presented sufficient evidence of a likelihood of success on the merits and the Circuit Court did not abuse its discretion in finding such a likelihood of success.[3]

C. The Circuit Court Did Not Abuse Its Discretion In Finding a Likelihood of Irreparable Harm.

Lewallen argues that the temporary injunction was improperly based on hypothetical disclosure or use of information. The South Carolina Uniform Trade Secrets Act specifically provides that "threatened misappropriation may be enjoined." S.C. Code § 39-8-50 (A). Moreover, prior disclosure or use of confidential information or trade secrets does not require a showing of actual use or disclosure of confidential information or trade secrets. See Fundamental Admin. Servs., LLC v. Anderson, 18 F. Supp. 3d 680, 683 (D. Md. 2014) (rejecting the proposition that a Court must fine that the defendant has already improperly

[3] LALLC notes that the evidence recounted in this Initial Brief is only the evidence that was presented to the Circuit Court in support of the motion for temporary injunction, and does not include the facts that discovery has revealed since that time.

disclosed confidential information and finding such argument is not "logical when considered in light of the prevailing standard for preliminary injunctive relief . . .").[4]

Regardless, LALLC presented evidence of actual use and disclosure of trade secrets and confidential information, as set forth in Argument II, B, above. The use and disclosure of this information constitutes actual irreparable harm and a threatened misappropriation that was properly enjoined. Indus. Packaging Supplies, Inc. v. Martin, No. 6:12-cv-713, 2012 U.S. Dist. LEXIS 43580, 2012 WL 1067650 *5 (D.S.C. Mar. 29, 2012) (citing cases supporting the proposition that "[c]ourts consistently have recognized that...the misappropriation of proprietary information constitutes irreparable harm to an employer."); S.C. Code § 39-8-50 (A) ("threatened misappropriation may be enjoined"); see also P&G v. Stoneham, 747 N.E.2d 268, 274 (Ohio Ct. App. 2000) (stating that "a threat of harm warranting injunctive relief can be shown by facts establishing that an employee with detailed and comprehensive knowledge of an employer's trade secrets and confidential information has begun employment with a competitor of the former employer in a position that is substantially similar to the position held during the former employment.").

LALLC's loss of control over its valuable proprietary spreadsheet and the disclosure by Lewallen of the spreadsheet constitute irreparable harm. See Woods v. Boeing Co., C.A. No. 2:11-cv-02855-RMG, 2013 U.S. Dist. LEXIS 136543 at *12, 2013 WL 5332620 at * 4, (D.S.C. Sept. 23, 2013) (finding irreparable harm where a former employee retained the former employer's documents and disclosed such documents to his attorney without the former employer's consent.).

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[4] The Court in Fundamental Admin. Servs., LLC was applying Federal Rule of Civil Procedure 65. The Notes to Rule 65, SCRCP, state that "Rule 65 ... is substantially the Federal Rule which, in turn, is very much the same as present State practice."

D. The Temporary Injunction Is Proper under Rules 52 and 65(d).

Lewallen's argument that the Temporary Injunction violates Rule 65(d)'s provision that injunctions be specific and "shall describe in reasonable detail, and not by reference to some other document, the act or acts sought to be restrained . . ." However, the temporary injunction clearly meets this standard.

The requirements of Rule 65(d), SCRCP, are substantially the same as the federal rule. The United States Supreme Court has explained that the specificity provisions in Federal Rule of Civil Procedure 65(d) are "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree to vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476 (1974). "[T]he mere fact that interpretation is necessary does not render the injunction so vague and ambiguous that a party cannot know what is expected of him." Scardelletti v. Rinckwitz, 68 Fed. Appx. 472, 479 (4th Cir. 2003).

The Fourth Circuit Court of Appeals and District Court for the District of South Carolina have frequently issued and upheld injunctions that merely prohibit the use or disclosure of trade secrets and confidential information. See Ciena Corp. v. Jarrard, 203 F.3d 312 (4th Cir. 2000) (affirming injunction preventing defendant from "using, disclosing, or otherwise misappropriating any of CIENA's trade secrets or confidential information" and specifically rejecting the argument that this was insufficiently specific); Indus. Packaging Supplies, Inc., 2012 U.S. Dist. LEXIS 43580, at *20, 2012 WL 1067650, at *7 (enjoining the defendants "from using, disclosing, or transmitting [the plaintiff's] trade secrets and confidential information as defined by S.C. Code Ann. § 39–8–20(5)"); Uhlig, LLC v. Shirley, C.A. No. 6:08-cv-1208, 2008 U.S. Dist. LEXIS 123899, at *16-17, 2008 WL 3057290, at *9 (D.S.C. May 13, 2008) (granting a preliminary injunction preventing the

defendants "from using or revealing in any manner trade secrets, as defined in South Carolina Code Ann. § 39-8-20(5)," of the plaintiff). The temporary injunction at issue here is more specific than any of the injunctions issued in those cases and is clearly proper under Rule 65(d), SCRCP. Moreover, the Circuit Court made specific findings of fact that were proper under Rules 65(d) and 52, SCRCP.

E. The Circuit Court Did Not Err By Not Limiting the Non-Disclosure to Information Not Provided By the Customer.

Contrary to Lewallen's argument, the mere fact that information is available from the customer does not mean that such information is not a trade secret. Rather, a trade secret is any information that "(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a). The South Carolina Uniform Trade Secrets Act specifically provides that "[a] trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy." Id. at (5)(b). Interpreting these provisions, the District Court for the District of South Carolina has specifically held that customer needs, preferences, and pricing may be a trade secret if it "would allow someone to immediately compete for the customer's business without having to spend a significant amount of time researching the customer's needs, preferences, and pricing tolerances." Uhlig LLC v. Shirley, No. 6:08-CV-01208-

JMC, 2012 WL 2923242, at *6, 2012 U.S. Dist. LEXIS 99387, at *22 (D.S.C. July 17, 2012).

Here, the trade secrets and confidential information that LALLC seeks to protect are not readily ascertainable and include compilations of information, some of which may be available from the customers, but would require substantial effort to ascertain and would provide a competitive advantage. Thus, the Circuit Court did not abuse its discretion.

F. The Circuit Court Did Not Abuse Its Discretion In Finding There Was No Adequate Remedy at Law.

"[D]isclosure of business proprietary information can be highly damaging and irreparable by conventional legal remedies." Woods, 2013 U.S. Dist. LEXIS 136543 at *12, 2013 WL 5332620, at *4. In Woods v. Boeing Co., supra, the District Court for the District of South Carolina awarded a permanent injunction and found irreparable harm and the absence of an adequate remedy at law where the former employee violated his confidentiality agreement by failing to return proprietary documents upon his termination and by providing such documents to his attorney. 2013 U.S. Dist. LEXIS 136543 at *8, 2013 WL 5332620, at *3. Here, Lewallen did more than disclosing the documents to counsel; he disclosed the customer list to a third party, as explained above. He also has used LALLC's employee list and projects those employees have worked upon to target LALLC employees that have been assigned to key customer accounts in order to strategically hire away such employees. This has resulted in a loss of business from a key customer.

Moreover, the confidentiality provision in the Membership Interest Purchase Agreement, to which Lewallen agreed, specifically provides that "[a]ny remedy at law for any breach of the provisions contained in this Section shall be inadequate and the non-breaching party shall be entitled to injunctive relief in addition to any other remedy available

hereunder or under applicable Law." (R. at 245, R. at 272). In addition, "'the mere fact that a plaintiff may recover damages does not negate his right to injunctive relief.'" Uhlig, LLC v. Shirley, No. 6:08-cv-01208, 2012 U.S. Dist. LEXIS 88632, 2012 WL 2458062 at * 3 (D.S.C. June 27, 2012) (despite award of monetary damages, issuing an injunction prohibiting the defendants "from using or disclosing for any purpose any and all information, documents, files, and data designated as a trade secret pursuant to South Carolina Code of Laws § 39-8-20 by Uhlig and not excluded from such designation by previous order of the court.") (quoting PBM Products, LLC v. Mead Johnson & Co., 639 F.3d 111, 128 (4th Cir. 2011)).

III. The Circuit Court Did Not Err In Temporarily Enjoining Lewallen from Making Misrepresentations to LALLC's Customers Regarding LALLC's Capacity to Fulfill Customer Orders , or from Making Any Statements To LALLC Customers, Vendors, or Employees Suggesting that LALLC's Officers Falsify Financial Records, that LALLC Is Going to Cease Business Operations, Or Any Other Statement Meant to Cause Harm to LALLC.

LALLC presented evidence that Lewallen contacted at least one LALLC customers and informed it that LALLC was going to cease business operations and stop providing the product that the customer needed because Lewallen, as the former sole owner of LALLC and current part-owner of LALLC, was taking all of the current LALLC employees with him to begin a new business venture and LALLC would, therefore, not be able to fill the orders of its customers. (R. pp. 223 ¶¶3-4; R. pp. 225-226 ¶¶3-4). These statements by Lewallen are false (R. p. 189 ¶14) and illustrate the need for the temporary injunction. To the extent any such evidence was hearsay or

otherwise inadmissible, it was properly within the discretion of the Circuit Court to consider such evidence for purposes of the temporary injunction.[5]

Contrary to Lewallen's argument, LALLC showed irreparable harm from such statements. Lewallen is a former vice president and owner of the business whose name is still contained within the name of the business. Statements that disparage the business carry substantial weight when coming from Mr. Lewallen. The fact that a customer was concerned enough to inquire LALLC regarding these statements reveal harm to reputation and good will. Mr. Lewallen should not be permitted to derogate the value of the customers and good will that were the essence of Mr. Lewallen's sale of his membership interest. Courts have frequently issued injunctions similar to that issued in this matter. See, e.g., Rodriguez v. National Freight, Inc., 5 F. Supp. 3d 725, 731 (M.D. Pa. 2014) (enjoining Plaintiff "from communicating regarding the issues and facts giving

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[5] The purpose of a preliminary injunction is to preserve the status quo "until an opportunity is offered for full and deliberate trial investigation." See, e.g., Curtis, 345 S.C. at 569, 549 S.E.2d at 597. "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Consequently, courts may rely on even inadmissible evidence, including hearsay, in deciding a motion for preliminary injunction. See, e.g., Lockhart v. Home-Grown Indus. of Ga., Inc., 2007 U.S. Dist. LEXIS 67256, at *16 (W.D.N.C Sept. 10, 2007) ("At the preliminary injunction stage . . . the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) ("The Federal Rules of Evidence do not apply to preliminary injunction hearings."); Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction . . . ."); Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993) (courts at preliminary injunction stage "may rely on otherwise inadmissible evidence, including hearsay"); Johnson v. Couturier, 572 F.3d 1067, 1083 (9th Cir. 2006) ("A district court may, however, consider hearsay in deciding whether to issue a preliminary injunction."); SEC v. Cherif, 933 F.2d 403, 412 n. 8 (7th Cir. 1991) ("hearsay can be considered in entering a preliminary injunction.").

rise to this litigation with any individual or entity Plaintiff knows to be a current, former, or prospective customer of Defendants."); Select Comfort Corp. v. Tempur Sealy Int'l, Inc., 988 F. Supp. 2d 1047, 1055-56 (D. Minn. 2013) (enjoining the defendant from, among other things, making certain representations regarding the plaintiff and its products or services); Bluemile, Inc. v. Yourcolo, LLC, C.A. No. 2:11-cv-497, 2011 U.S. Dist. LEXIS 62178, at *5 (S.D. Ohio June 10, 2011) (enjoining defendant from, among other things, "[p]ublishing or otherwise disseminating defamatory statements or information about or referencing, directly or indirectly, Bluemile; and[ ] Interfering, directly or indirectly, with Plaintiff's relationship with and service to its customers, including without limitation the publication or other dissemination of false or defamatory statements about Plaintiff or the products and services provided by Plaintiff."); Quality Carriers, Inc. v. Mjk Distrib., 2002 U.S. Dist. LEXIS 5700, at *45, 2002 WL 506997, at *16 (S.D. Ill. April 2, 2002) (enjoining the defendant "from defaming or otherwise disparaging [the plaintiff] to the customers listed above.").

The temporary injunction in this matter is more specific than the ones listed above and fairly and precisely drew notice of what the injunction actually prohibited. Moreover, as these cases illustrate, the temporary injunction in this matter was not an invalid prior restraint.

IV. The Circuit Court Did Not Abuse Its Discretion In Determining the Amount of the Bond.

The Circuit Court set the bond in this case at $2,500. This was an appropriate amount for several reasons. First, the temporary injunction was premised on requirements that Lewallen was already bound to follow, namely, the Agreements and the South Carolina Uniform Trade Secrets Act. It also prohibited him from interfering with

LALLC's customer relationships, which he was already bound to do. Significantly, it did not prevent Lewallen from soliciting or servicing customers despite the fact that he had LALLC's valuable customer list and could have been prevented from soliciting such customers. Zoecon Indus. v. American Stockman Tag Co., 713 F.2d 1174, 1176 (5th Cir. 1983) (affirming injunction prohibiting former employees from calling customers on customer list); Alexander & Alexander Ben. Services, Inc. v. Benefit Brokers & Consultants, Inc., 756 F. Supp. 1408 (D. Ore. 1991) (granting preliminary injunction preventing former employees from soliciting or accepting business of entities who were customers or prospective customers of the former employer based on copying of customer information).

Second, the temporary injunction only lasted 45 days. Consequently, the bond was set at an appropriate amount.

CONCLUSION

For all of these reasons, LALLC requests that the Court should dismiss Lewallen's appeal, or, in the alternative, affirm the temporary injunction.

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Respectfully submitted,

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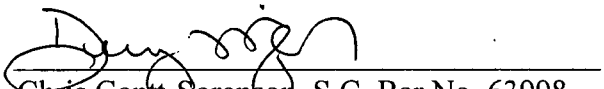

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February 16, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Special Circuit Judge

2014-002246

Lewallen Automation, LLC, and ASAG Energy, LLC, ... Respondents,

v.

Michael Lewallen and Everworks, LLC, ... Defendants,

Of whom Michael Lewallen is the .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondents' Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that the *Final Brief of Respondents* and *Certificate of Counsel* in the above-referenced matter were served on the following counsel of record via U.S. Mail, postage prepaid, on this the 16th day of February, 2015.

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